

February 3, 2017

**VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re:   *Protecting and Promoting the Open Internet*, GN Docket No. 14-28**

Dear Ms. Dortch:

On behalf of NCTA – The Internet & Television Association (“NCTA”) and USTelecom, we write in connection with the motions recently submitted in the above-referenced proceeding by industry groups seeking to stay the effective date of the enhanced transparency requirements under the *2015 Open Internet Order*.<sup>1</sup> NCTA and USTelecom support these motions; they present compelling procedural and substantive grounds for granting immediate relief from the enhanced transparency requirements in order to avoid irreparable harm. Importantly, however, the arguments set forth in those motions support granting relief across the industry from the enhanced transparency requirements, rather than staying the requirements only for the members of the associations that filed the motions. Thus, if the Commission decides to grant a stay of the enhanced transparency requirements, it should do so for all providers of broadband Internet access service (“BIAS”)—fixed and mobile, large and small.

As CTIA and the Competitive Carriers Association (“CCA”) explain in their motion, the enhanced transparency requirements should be stayed “because the Office of Management and Budget’s (‘OMB’) approval of the information collections pursuant to the Paperwork Reduction Act (‘PRA’) is premised in no small part on the Commission staff’s *2016 Guidance Public Notice*,” and “pending Applications for Review of that public notice show that the staff guidance is unreasonable and unlawful.”<sup>2</sup> Critically, the *2016 Guidance Public Notice* purported to establish new substantive disclosure obligations for *all* BIAS providers—not just the mobile providers that CTIA and CCA count as members, but also fixed broadband and other mobile providers, including NCTA’s and USTelecom’s members.<sup>3</sup> CTIA’s and CCA’s leading example of a new substantive requirement adopted in the *2016 Guidance Public Notice* is, in fact, one that

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<sup>1</sup> See Joint Motion for Administrative Stay, CTIA and Competitive Carriers Association, GN Docket No. 14-28 (filed Jan. 13, 2017) (“CTIA/CCA Stay Motion”); Request for Stay, Competitive Carriers Association, Wireless Internet Service Providers Association, NTCA – The Rural Broadband Association, an American Cable Association, GN Docket No. 14-28 (filed Jan. 13, 2017) (“Small Provider Stay Motion”).

<sup>2</sup> CTIA/CCA Stay Motion at 2.

<sup>3</sup> See generally *Guidance on Open Internet Transparency Rule Requirements*, Public Notice, 31 FCC Rcd 5330 (OGC/EB 2016) (“*2016 Guidance Public Notice*”).

applies to all mobile and fixed providers alike: the obligation to “ensure that consumers *actually receive*” disclosures at the point of sale.<sup>4</sup> Thus, the core defect identified by CTIA and CCA in the adoption of the *2016 Guidance Public Notice*—its imposition of “new substantive rules issued without any notice and comment, in violation of Section 553 of the Administrative Procedure Act”<sup>5</sup>—undercuts OMB’s reliance on that “guidance” in approving the enhanced transparency requirements for mobile and fixed providers.

The stay request filed by associations representing smaller BIAS providers points to the substantial burdens posed by various new and nebulous obligations under the enhanced transparency requirements—noting that the “uncontroverted record developed in connection with the [PRA] review process confirms that costs and burdens arising out of steps that must be taken to comply . . . will be significant.”<sup>6</sup> While these associations naturally focus on the costs imposed on their own members, compliance with the enhanced transparency requirements would subject *all* BIAS providers to unjustified burdens. For large and small providers alike, “[t]hese costs are not recoverable.”<sup>7</sup> And as Chairman Pai has explained, the new disclosure obligations provide “little if any benefit to consumers” and divert resources from efforts to “deploy faster and more sophisticated broadband networks.”<sup>8</sup> Indeed, in light of this “imposition of unnecessary and unjustified burdens on providers,” Chairman Pai and Commissioner O’Rielly recently reiterated that they “would have expanded the scope of providers eligible for [an] exemption” from the enhanced transparency requirements.<sup>9</sup> Thus, any stay plainly should apply more broadly than the limited set of providers eligible for the small business exemption under the *2015 Open Internet Order*.

Finally, granting only segment-specific stays while failing to provide relief across the industry would cause irreparable competitive harm to any BIAS providers that remain subject to the enhanced transparency requirements. As Chairman Pai has observed, “facilities-based, intermodal competition” among BIAS providers “is thriving,” as “[t]raditional telephone companies, cable operators, mobile phone companies, satellite providers, wireless Internet

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<sup>4</sup> CTIA/CCA Stay Motion at 7-8 (quoting *2016 Guidance Public Notice* at 9).

<sup>5</sup> *Id.* at 4; *see also id.* at 10 & n.30 (explaining that “[s]imply referring to agency action as ‘guidance’ . . . does not exempt the Commission from complying with the APA’s notice and comment obligations when its action establishes new substantive rules,” and collecting cases).

<sup>6</sup> Small Provider Stay Motion at iv.

<sup>7</sup> *Id.* at 8.

<sup>8</sup> Remarks of FCC Commissioner Ajit Pai Before the Heritage Foundation, Feb. 26, 2016, at 4, *available at* [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-337930A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-337930A1.pdf); *see also* Reply Comments of NCTA, GN Docket No. 14-28, at 37-40 (filed Sep. 15, 2014) (noting the broad consensus among commenters that enhanced disclosure obligations “not only are unnecessary but likely would be counterproductive”).

<sup>9</sup> Letter of Commissioners Pai and O’Rielly to Industry Associations, Dec. 19, 2016, at 1, *available at* [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db1219/DOC-342677A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1219/DOC-342677A1.pdf).

service providers, and others compete vigorously against each other.”<sup>10</sup> In light of this increasingly dynamic marketplace, it would be fundamentally unfair and harmful to competition to leave burdensome and unjustified disclosure mandates in place for some BIAS providers, while excusing large swaths of the industry, including those providers’ direct competitors, from compliance. Moreover, such harms would be wholly unnecessary in light of the robust information independently required under the *2010 Open Internet Order*.<sup>11</sup> Those transparency requirements—which will remain in effect—ensure that ample information about broadband service attributes will remain available to consumers, enabling them to make fully informed decisions about the broadband services available in the marketplace.

NCTA and USTelecom thus respectfully request that the Commission grant any stay of the enhanced transparency requirements on an industry-wide basis.

Sincerely,



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Rick Chessen  
Senior Vice President, Law & Regulatory Policy  
NCTA



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Jonathan Banks  
Senior Vice President, Law and Policy  
USTelecom

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<sup>10</sup> Remarks of Commissioner Pai at the International Institute of Communications Forum, Apr. 27, 2015, at 3, *available at* [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-333190A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-333190A1.pdf).

<sup>11</sup> *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17937, 17941, ¶¶ 56, 59 (2010) (“*2010 Open Internet Order*”), *aff’d in relevant part Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).